

\*E-FILED 5/14/2008\*

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

11 PIOTR J. GARDIAS,

No. C04-04086 HRL

12 Plaintiff,

Consolidated With: C04-04768 HRL  
C05-01242 HRL  
C05-01833 HRL  
C06-04695 HRL

13 v.

15 SAN JOSE STATE UNIVERSITY,

**INTERIM ORDER RE DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

16 Defendant.

17 \_\_\_\_\_/18  
19 On March 10, 2008, defendant filed a revised motion for summary judgment.<sup>1</sup> Plaintiff  
20 belatedly filed (by one day) his opposition brief, along with a number of exhibits and other  
21 supporting papers. Defendant has filed a reply.22 Ordinarily, briefing on the motion would now be closed. *See* Civ. L.R. 7-3(d).  
23 However, it has come to the court's attention that defendant may not have received a copy of all  
24 of the exhibits and other supporting documents plaintiff filed with his opposition brief.  
25 Additionally, defendant has submitted with its reply brief a number of declarations that it  
26 apparently neglected to file on March 10, 2008 with its revised motion. It represents that these  
2728 \_\_\_\_\_  
<sup>1</sup> Defendant previously filed a motion for summary judgment in September 2007. That motion was terminated, and a new briefing and hearing schedule was set when defendant indicated that it intended to re-notice and supplement its original motion to include evidence from plaintiff's 2008 deposition testimony. (See Docket No. 322).

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1 declarations are identical to the ones that were filed and served last fall, except that defense  
2 counsel's declaration attaches approximately 11 pages of testimony from plaintiff's 2008  
3 deposition. Plaintiff claims that he did not receive the cited portions of his 2008 deposition  
4 testimony before his opposition was due.

5 Based on the foregoing, this court issues the following interim order:

6 1. The court will allow the record to be augmented to include all of the declarations  
7 defendant belatedly submitted with its reply brief on May 6, 2008. The court finds no serious  
8 prejudice here because these declarations appear to be the same as those which were filed and  
9 served on plaintiff in September 2007, and plaintiff has responded to these declarations in his  
10 opposition papers.

11 Nevertheless, the record indicates that plaintiff did not receive a copy of the 11  
12 pages of cited testimony from his 2008 deposition until after defendant filed its reply. It is not  
13 apparent that plaintiff has been seriously prejudiced by the omission, but he will be given  
14 permission to file a supplemental response (if he wishes) as to the cited portions of his 2008  
15 deposition testimony. **However, plaintiff is advised that he is being given permission to file**  
16 **a supplemental response only as to the 11 additional pages of testimony which he**  
17 **apparently did not receive before his opposition was due.** The court finds that he has  
18 otherwise had more than ample opportunity to file his written opposition to defendant's motion.  
19 Plaintiff is **not** being given permission to file a supplemental response as to anything else.  
20 Plaintiff shall **not** repeat arguments or re-submit papers that he filed on April 23, 2008.  
21 Plaintiff's deadline for filing and serving a supplemental response is **May 30, 2008**.

22 2. Defendant's request to strike plaintiff's belated opposition papers is denied.  
23 However, plaintiff is advised that defendant is entitled a complete copy of **all** papers he filed  
24 with the court in connection with his opposition, even though those papers may include  
25 documents that defendant has in its possession. Indeed, he should have served defendant with  
26 these papers when he filed his opposition papers with the court on April 23, 2008. Although  
27 there is indication that some documents were subsequently sent to defense counsel, it is not  
28 clear what documents may (or may not) have been sent. Accordingly, no later than **May 30**,

1 **2008**, plaintiff shall (a) serve on defense counsel a copy of all of the exhibits and other  
2 supporting documentation that he filed with the court on April 23, 2008 in support of his  
3 opposition; and (b) file a proof of service with the court. Plaintiff shall not re-file his exhibits  
4 and supporting papers with the court.

5           3. To the extent defendant wishes to file a response to plaintiff's exhibits and other  
6 supporting documentation, its supplemental reply shall be filed **no later than June 17, 2008**.

7       4. Following the submission of defendant's supplemental reply, briefing on this  
8 matter will be closed. Unless the court otherwise orders, no further papers will be accepted.

9       5.       The motion hearing set for May 20, 2008 is **continued to July 1, 2008, 10:00**  
10      a.m. in Courtroom 2.

11       6.       The final pretrial conference (July 22, 2008) and trial (set to begin on July 28,  
12 2008) are VACATED and will be re-set, as may be appropriate, after defendant's summary  
13 judgment motion has been resolved.

SO ORDERED.

15 || Dated: May 14, 2008

  
HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

**United States District Court**

For the Northern District of California

1     **5:04-cv-4086 Notice will be electronically mailed to:**  
2     Mary Susan Cain-Simon Mary.CainSimon@doj.ca.gov, David.Moss@doj.ca.gov  
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